Book Review

ECONOMIC ANALYSIS OF LAW, by Richard A. Posner. Boston: Little, Brown & Co., 1972. Pp. xi, 415.

*Reviewed by Paul D. Carrington**

This book is not easily evaluated. It is unquestionably a substantial intellectual achievement, but it is not lacking in faults. It is admirably lucid in its presentation of intricate analysis and argument, yet sometimes too simple. It is amazing in the breadth of the range of legal problems addressed, yet often parochial in the range of issues raised. It is eminently topical, and yet anachronistic. It is usually stimulating, but it is sometimes merely provoking.

Viewed simply as an intellectual achievement, Professor Posner's accomplishment is that he has reunited two divergent strands of rational intellectual tradition, the classical economic rationalism sired by Adam Smith[1] and the common law rationalism which can be said to date from William Blackstone.[2] To this reviewer it is an intriguing thought that many of the features of the work suggest that it might have been written either by a resurrected Smith or a resurrected Blackstone.

Thus, Blackstone and Smith each wrote with an extraordinarily lucid, if somewhat oracular, style. So does Posner. While Smith analyzed markets and Blackstone analyzed court decision, both proceeded from the assumption that human behavior is essentially, if not completely, rational. So does Posner. Both Blackstone and Smith were prone to attribute to human rationality a commanding force over social institutions and relationships which dooms the efforts of well-meaning statesmen to improve them: market decisions and court decisions were seen to result from the same divine source of reason. Posner manifests some of the same propensity.

It is not hard to find a cause of the similarity between Blackstone and Smith. Smith was born in the early summer of 1723 in Scotland;[3] Blackstone a month later in London.[4] Blackstone studied at Oxford from 1738 to 1746; Smith was at Oxford from 1740 to 1748. Smith began lecturing in Glasgow in 1751, Blackstone at Oxford in 1753. Blackstone's great work was completed in 1769, Smith's in 1776. Smith was the more creative of the two and had much the greater impact, but the influence of both can be seen in the development of many of the social thinkers who succeeded them, perhaps most notably Bentham[5] and Mill.[6] The connection between

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1. *E.g.*, A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).
2. *E.g.*, W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (4 vols. 1765-1769).
3. *See generally* J. RAE, LIFE OF ADAM SMITH (1895).
4. *See generally* L. WARDEN, THE LIFE OF BLACKSTONE (1938).
5. Jeremy Bentham, perhaps the most articulate advocate of utilitarianism, was a severely critical student of Blackstone; see his FRAGMENT ON GOVERNMENT (1776).

the two academic professions spawned by each has never been wholly forsaken. The bridge was traversed rather carefully in 1924 by John Commons[7] and there are many other links.

Nowhere has the connection been so important as at the University of Chicago. The economics faculty of that institution has, at least in recent decades, been deeply immersed in the classical tradition. Doubtless this intense commitment has facilitated the close intellectual relationship maintained between that faculty and the law faculty of the same university. The Posner book is surely the product of that relationship, for much of what Posner has done is to capture in a single volume the rather distinctive ideology which has tended to reflect itself in the intellectual activity of the University of Chicago Law School for the last 20 years or so. He has enabled every law teacher and student to receive an intellectual transfusion from that very intense and admirable institution.

As an intellectual achievement, the book merits a careful, thorough, critical review. Such a review would, in effect, appraise the contribution of the University of Chicago Law School to American legal thought since World War II. Such a review is beyond the resources of this reviewer. The reader will therefore be forced to settle for a few rather casual reactions to some of the very widely ranging analyses which Professor Posner tenders in this work.

One cannot fail to note the almost predictable perversity with which Posner resists most efforts to use the legal system to improve the quality of life. Most programs which the conventional wisdom holds to be liberal and humane, such as environmental protection, consumer protection, and income redistribution, are revealed to be economically unsound, at least in some degree. This iconoclasm is often refreshing, usually stimulating, and generally true to the memory of the mentor, Smith.

On the other hand, the analysis of controversial issues is often short of persuasive. One flaw in the analysis, as it seems to this reviewer, is a tendency of Posner to be doctrinaire. This tendency is fairly overt; Posner, with few exceptions, cites only his colleagues at the University of Chicago or their students and associates. Nobel Prize winner Paul Samuelson does make one footnote,[8] and there are occasional references to such outsiders as Guido Calabresi;[9] but these are the exception. This reader, at least, was often excited by an unsatisfied desire to give equal time to economists of more varied bents.

The influence of Smith is plainly visible in his INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

6. John Mill studied law with John Austin, a student of both Bentham and Blackstone, and Bentham himself was a friend of Mill's father. Mill's principle work of legal philosophy, ON LIBERTY (1852), is a refinement of ideas traceable to the FRAGMENT, *supra* note 5. His principle work of economic philosophy, THE PRINCIPLES OF POLITICAL ECONOMY (1848) is at once the progeny of Bentham and Smith. On the relationship between Blackstone, Bentham, and Mill, see Warnock, *Introduction* to J. MILL: UTILITARIANISM AND OTHER WRITINGS (1962).

7. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1957). This work is, in a sense, a negative of Posner's, providing a classical legal analysis of economic relationships.

8. Posner is careful to cite Samuelson's critics. R. POSNER, ECONOMIC ANALYSIS OF LAW 149 n.5 (1972) [hereinafter cited as POSNER]. For an exchange of fire between Posner and a divergent economist, Lester Thurow see 33 THE PUBLIC INTEREST 109 (1973).

9. *E.g.*, POSNER 29 n.4, 68 n.2, 84 n.1, 88 n.5.

A related limitation is that the analysis presented is often made to rest on vulnerable assumptions about human behavior. True to the classical tradition, Posner tends to assume that we all know what we are doing and why. There is little concern manifested for the welfare of those of us who are too shortsighted or heedless or unaspiring to make sensible market decisions.[10] And there is little recognition of the realities of administrative behavior, and the extent to which organizational decisions are made irrationally as a result of internal political stresses.[11]

Similarly, the analysis is often limited by Posner's preoccupation with economic efficiency as a goal. He acknowledges, at least in the introduction, that he is presenting his economic analysis as a tool, not as an end. And, from time to time, he treats unmarketable rewards as values to be appraised in making economic judgments. Nevertheless, he often rather self-consciously excludes from considerations a range of moral values to which the legal system plainly assigns substantial importance. Thus, for example, the economic analysis of school desegregation has an especially unworldly quality.[12] I, at least, am more boggled than persuaded by the effort to analyze such problems without reference to moral preachments.

Moreover, the analysis is discomfortingly dependent at times on assumptions which may even be demonstrably wrong and which are, at best, questionable. An example is the assertion that environmental amenities are enjoyed more by middle and upper income people than by the poor,[13] or the assertion that environmental improvements will redound primarily to the benefit of the landowner, at the expense of his tenants.[14] I am simply unable to accept these assertions as premises without much more elaborate demonstration than Posner offers.

In sum, for all of these reasons, virtually all of the many problems to which the book is addressed are left at large. On no issue, it seems to me, has Posner said the final word.

But this is not to say that Posner's analysis lacks substantial practical value. The volume abounds in unconventional ideas; some of them must be sound. The reviewer was especially attracted to the suggestion that the challenge of judicial administration might be met, at least in part, by selling places on the docket.[15] Claimants with greater confidence in their claims, and in greater urgency, might yield a small fraction of their recovery in order to secure a docket preference. If claimants were willing to bid very substantial fractions of the recovery for such preferences, this would be a strong indication that there is a genuine need for more judicial services. The strength of this suggestion that the courthouse be made a marketplace is that it directs attention to an important, basic value choice which is often disguised by conventional rhetoric about judicial administration. Free, instant access to courts is a diverting goal which seems very attractive to a democra-

10. *Cf. id.* at 53-55, 88-92.

11. There is a substantial literature on this subject which seems to be largely ignored in Posner's analysis. Perhaps the basic work is H. SIMON, ADMINISTRATIVE BEHAVIOR (1947). *See also* G. KATONA, PSYCHOLOGICAL ANALYSIS OF ECONOMIC BEHAVIOR (1951). A review of more contemporary literature is DECISION MAKING (W. Edwards & A. Tversky eds. 1967). Posner does acknowledge behavior science in his frequent consideration of degrees of risk of aversion.

12. POSNER 297-300.

13. *Id.* at 38.

14. *Id. But see* R. NETZER, ECONOMICS OF THE PROPERTY TAX 32-40, 59-62 (1966).

15. POSNER 354-56.

tic government. But the costs of litigation are very great, indeed, for everyone concerned, and a system which encourages promiscuity in the use of the process gives poor service to all.

Thus it is widely assumed that humanitarian motives justify the maximum extension of the availability of appellate and post-conviction remedies for those who are incarcerated.[16] But, to take the Posner suggestion a step further, we ought to consider whether those to whom such remedies are supplied would not rather have a comparable benefit conferred in the coin of the realm. Thousands of convicts are presently congesting our appellate courts with hopeless or nearly hopeless appeals.[17] How many of these persons would prefer to save the cost of such proceedings if they could themselves share substantially in the resulting saving? We democrats are likely to blanch at the thought that a prisoner might be rewarded for failing to assert a possible right, or at Posner's thought that a civil litigant might be permitted to trade money for a docket preference. Perhaps, indeed, these ideas are too crass, and should be discarded in favor of instruments which are less direct in forcing upon individuals such choices.[18] But, in some form, it is eminently desirable that we face the fact, and face it regularly, that litigation is not cost-free. It always and inevitably involves the diversion and consumption of scarce resources which ought to be allocated by someone through some rational process, by market decision or otherwise.

Thus far, this review has commented upon the book simply as an intellectual achievement. But it was not written as an intellectual museum piece; it is intended as a textbook. The reviewer has never taught a course for which this book would be suitable (few law teachers have) and I am not a candidate to teach such a course. Nevertheless, a few remarks on the advantages and difficulties of such instruction are in order.

As material for a law school course, the book is distinctly unconventional because it includes no judicial decisions. Given the subject, this seems to be a good idea. Doubtless, one could devise a systematic economic analysis from judicial opinions, but it would probably be mediocre economics or worse, and it would be quite inefficient. The nonjudicial approach is most welcome, and a much-needed step if we are to make real progress in enlarging the limited perspective which most law students are impelled to impose on their professional study. The teacher of such a course will require some substantial grounding in both law and economics. Presumably, he will have to lecture considerably, if for no other reason than to challenge the author. But the book is replete with difficult and highly discussable questions and problems. I can only complain, and it is not really a complaint, that some of them were beyond my limited ability to solve acceptably.[19]

The major question to raise about the book as a teaching device is whether such a course is the best means to attain the goal which ought to be pursued by cross-disciplinary study of law and economics. If the purpose is to heighten the traditional analytical skills of law students who have selected

16. The familiar tale is fully told in F. GRAHAM, THE SELF-INFLICTED WOUND (1970). *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).

17. The impact on the Supreme Court of the United States has been recently recounted in Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972).

18. I am uncertain what these might be. Current discussion concerning the allocation of scarce energy resources suggests that the choices are not numerous.

19. There is a teacher's manual to help the innocent. Its answers to the questions are not less imbalanced than the text.

themselves to acquire a modicum of the somewhat different perspective of the economist, the book is suitably designed for the purpose. Students who have experienced such a course should enhance their analytical abilities, perhaps substantially.

But some prospective teachers may be attracted to two other, related goals for which the book is less well-suited. Thus, some may prefer to try to impart to law students a systematic, or at least a schematic, knowledge of economics and its literature. But this volume is organized by legal categories. Its table of contents resembles a law school course announcement. And the author has deliberately repressed the use of the professional vocabulary of economics. For these reasons, students could devote quite a substantial effort to the book without improving substantially their ability to communicate with economists, to explore economics literature on their own, or to invoke substantive knowledge of economics in the solution of public problems not addressed by Posner. Economics is, in other words, presented only as a tool or discipline, all but divorced from its lore and setting.

Or a teacher might be motivated by the purpose of persuading law students that their career learning agendas should include a substantial commitment to the discipline, traditions, and literature of economics. For this purpose, the book is limited in value because it is addressed to students who are already persuaded to take a first step and by its failure to explore a wider range of economic literature. For such a purpose, a course designed around a public problem which features both legal and economic components is a better vehicle. Such courses might be quite general, *e.g.*, Housing, Energy, Welfare, or traditional Antitrust. Or they might be more specific in focus. In either case, the legal literature presented would be but one of two or more literatures to be used, the student being given ample time and guidance to permit mastery of at least some of the economics literature that pertains. Such an approach to economics would proceed more narrowly, but might penetrate more deeply. In such a course, it might well prove to be useful to ask students to read a paragraph, a page, or a chapter of Posner. But the book as a whole will not be an effective instrument with which to pursue that teaching goal.

I conclude that the book could provide a base for a challenging and exciting law school course, which should succeed if the goal of the course is defined as that of the book.[20] The book is also a challenge of interest to those who have no intention of teaching or studying such a course. In any case, however, the reader is warned that the book is sometimes over-simplified, parochial and anachronistic; it demands the most critical reading the reader can give it.

20. Those interested in enlarging the intellectual horizons of law students should also examine J. WHITE, THE LEGAL IMAGINATION (1973), and A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS AND "LAW" (1973).